FILE COPY

MAY 1 1959

JAMES R. BROWNING, C

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. 883

EMBRY BROTHERS, INC.,
JAMES DRURY, - - - - - - - - Petitioners,

*versus*

HOWARD L. DAVIS,
CITIZENS FIDELITY BANK & TRUST COMPANY,
UNITED STATES OF AMERICA, - Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

HARDY & LOGAN,
RALPH H. LOGAN,
MARSHALL B. HARDY, JR.,
506 West Jefferson Street,
Louisville, Kentucky,
*Attorneys for Petitioner, Embry Brothers, Inc.*

WILLIAM B. COHEN,
1516 Ky. Home Life Bldg.,
Louisville, Kentucky,
*Attorney for Petitioner, James Drury.*

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

# INDEX


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2- 3 |
| Statute Involved | 3 |
| Statement | 3- 5 |
| Reasons for Granting the Writ | 6-11 |
| Conclusion | 11 |
| Appendix A—Judgment and Order Denying Petition for Rehearing | 13 |
| B—Statute | 14 |

## CITATIONS.

Cases:


| | PAGE |
|---|---|
| Henningsen v. United States Fidelity & Guaranty Company, 208 U. S. 404 | 6 |
| United States v. Munsey Trust Company, 332 U. S. 234 | 6-7 |
| National Surety Corporation v. United States, 133 F. Supp. 381 | 7 |
| MacEvoy v. United States for the use of the Calvin Tomkins Company, 322 U. S. 102 | 7 |
| Brogan v. National Surety Co., 246 U. S. 257 | 7 |
| U. S. v. S. Birch & Sons Construction Company, 43 F. Supp. 726 | 7 |
| U. S. v. Castro, 71 F. Supp. 36 | 7 |
| Indemnity Insurance Company of North America v. Browning Ferris Machinery Company, 227 Fed. 2d 804 | 7 |
| Continental Casualty Company v. Clarence L. Boyd Company, 140 Fed. 2d 115, 116 | 7 |
| U. S. v. Chester Construction Company, 104 Fed. 2d 648, 649 | 7 |
| United States for the use of J. H. Welch v. Fleisher Engineering and Construction Co., 30 F. Supp. 961 | 8 |
| United States for the use of Bruce Co. v. Fraser Construction Co., 87 F. Supp. 1 | 8 |
| United States for use of John A. Denie's Sons Co. v. Bass, 111 Fed. 2d 965 | 8 |
| United States for the use of Hargis v. Maryland Casualty Co., 64 F. Supp. 522 | 8 |
| Houston Fire and Casualty Insurance Co. v. United States for the use of Trane Co., 217 Fed. 2d 727 | 8 |
| Coffee v. United States for the use of Gordon, 157 Fed. 2d 968 | 8 |
| Belknap Hardware and Manufacturing Company v. Ohio River Contract Company, 271 Fed. 144 | 9 |

PAGE

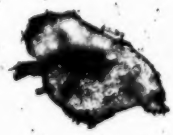
Socony-Vacuum Oil Company v. Continental Casualty Company, 219 Fed. 2d 645 ..... 9
In re: P. McGarry & Son, 240 Fed. 400 ..... 9
Greenville Savings Bank v. Lawrence, 76 Fed. 545 ..... 9
Cox v. New England Equitable Insurance Company, 247 Fed. 955 ..... 9
Philadelphia National Bank v. McKinley, 72 Fed. 2d 89 ..... 9
American Surety Company of New York v. Westinghouse Electric Manufacturing Company, 296 U. S. 133 ..... 9
Jackson Lumber Co. v. Union Transfer and Storage Co., 246 Ky. 653 ..... 10
Wilmington Housing Authority v. Fidelity and Deposit Co., 47 A. 2d 524 ..... 10
Seaboard Surety Co. v. Spear, 119 Fed. 2d 849 ..... 11

**Statutes and Rule:**

28 U. S. C. Secs. 1332; 1335; 1397 ..... 2
Rule 22, Federal Rules of Civil Procedure ..... 2
Miller Act, 49 Stat. 793, 40 U. S. C. A. 270 a-d ..... 3

**Miscellaneous:**

Restatement of the Law of Contracts, Sec. 183 ..... 10



IN THE

# Supreme Court of the United States

October Term, 1959.

No. _____

---

EMBRY BROTHERS, INC.,
JAMES DRURY, - - - - - - - *Petitioners,*

*v.*

HOWARD L. DAVIS,
CITIZENS FIDELITY BANK & TRUST COMPANY,
UNITED STATES OF AMERICA, - - *Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

---

*To the Honorable the Justices of the Supreme Court of the United States:*

Petitioners, Embry Brothers, Inc., and James Drury pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on October 10, 1958.

## OPINIONS BELOW.

No opinions have been reported or filed in this case by either the United States District Court for the Western District of Kentucky nor by the United States Court of Appeals for the Sixth Circuit. The Record contains Findings of Fact and Conclusions of Law (Appendix 5, pages 23a-29a) and Judgment (Appendix 6, pages 30a-31a) by the District Court, and Judgment (sixth unnumbered page (third sheet) following page 31a) and Order Denying Rehearing (fourth page (second sheet) following page 41a) by the Circuit Court of Appeals. The Judgment and the Order Denying Rehearing (by the Court of Appeals) are reprinted in Appendix A, *infra,* page 13.

## JURISDICTION.

The judgment of the Court of Appeals was entered on October 10, 1958. A timely petition for rehearing was denied February 4, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., Secs. 1332; 1335; 1397, and Rule 22, Federal Rules of Civil Procedure.

## QUESTIONS PRESENTED.

1. Where a prime contractor, employed on United States Army construction, contracts to pay a subcontractor by joint checks made out to him and suppliers of materials, do such suppliers have a contractual or equitable right to be paid by the prime contractor out of funds due jointly to the subcontractor and them-

selves ahead of creditors of the subcontractor whose claims rest upon:

a. A written assignment by subcontractor of the *chose in action* to secure a pre-existing debt?

b. Withholding and excise taxes assessed against the general estate of the subcontractor?

2. Whether a prime contractor on a Government project who has been sued by a subcontractor on a subcontract can pay money into court by way of a settlement and be released from liability to the laborers and materialmen of the subcontractor by interpleading them without the said laborers and materialmen being paid, although the subcontract provided that the prime contractor would pay materialmen and laborers by issuing joint checks to the subcontractor and materialmen?

## STATUTES INVOLVED.

The pertinent provisions of the Miller Act, 49 Stat. 793, 40 U. S. C. A. 270 a-d, are set out in Appendix B, *infra*, page 14.

## STATEMENT OF THE CASE.

Howard L. Davis executed on February 16, 1952, a subcontract for certain construction work on a United States Army installation at Fort Campbell, Kentucky, with J. W. Bateson Company, Inc., the prime contractor.

On July 2, 1952, Davis leased from Embry Brothers, Inc., certain equipment and likewise leased certain

equipment from James Drury. All of said leased equipment was used by Davis in the performance of his subcontract with Bateson.

On or about October 8, 1952, Bateson terminated his contract with Davis. On December 11, 1952, Davis filed the present action in the District Court against Bateson for breach of contract. James Drury demanded payment from Bateson for the use of his equipment on said Government project. Bateson refused to pay him, claiming the matter was in litigation.

On January 23, 1953, Davis made a written assignment to the Citizens Fidelity Bank & Trust Company for a pre-existing debt of $9,000.00 out of the proceeds to be recovered in this action. This debt was incurred prior to the subcontract with Bateson.

On March 2, 1953, the United States assessed withholding and excise taxes against Davis and in August and September, 1953, assessed further excise taxes against Davis.

On July 31, 1956, Davis and Bateson effected a compromise settlement under which Bateson paid into the District Court $20,000.00 there to abide the judgment and further orders of the Court.

On September 7, 1956, J. W. Bateson Company, Inc., filed a Second Amended Answer and Interpleader (Appendix 1, pages 9a-15a) and prayed to be discharged from any further liability to the Petitioners (*Ibid.*, pages 12a, 15a).

On September 27, 1956, Embry Brothers, Inc., filed an Answer to Interpleader and Cross-Claim (Appendix 2, pages 16a-18a) praying for a judgment in the sum of

$1,128.80 with interest thereon from October 29, 1952 (*Ibid.*, page 18a), and on January 16, 1957, James Drury filed an Answer to Interpleader and Cross-Claim (Appendix 3, pages 19a-20a) praying for a judgment of $725.00 with interest at 6% per annum from the 6th day of April, 1952 (*Ibid.*, page 20a).

On or about December 6, 1956, the District Court held that all counsel for Davis, including present counsel for the bank, had a prior and superior lien for their attorney's fees (Appendix 5, paragraph 5, page 26a).

The District Court held that after the deduction of Davis' attorneys' fees, the bank had an equitable lien on the balance of the fund by virtue of the assignment dated January 23, 1953, prior and superior to the lien of the United States; that the tax lien of the United States was superior to the claims of Embry Brothers, Inc., and Drury; and that Embry Brothers, Inc., and Drury were general creditors (*Ibid.*, paragraphs 1-3, page 29a).

Petitioners had a cause of action against Bateson, the prime contractor, as third-party beneficiaries under the subcontract (Appendix 7, pages 32a-41a). The District Court by its order discharged Bateson from any further liability to the Petitioners (Table of Relevant Docket Entries, 12-3, 1956, Appendix, page 3a), and then turned over the fund Bateson had paid into Court for this purpose to other creditors of Davis, preferring strangers to those who had helped to produce the fund. This is the injustice sought to be redressed by this Petition for Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

There are three important reasons for granting the writ in this case.

1. This Court has not previously defined the rights of laborers and materialmen who furnish labor and materials to a subcontractor on a Government construction project as regards priority of their claims to payment out of funds due the subcontractor from the prime contractor.

2. The decision of the Court below in affirming the judgment of the District Court abrogated the terms of a written contract between the prime contractor and subcontractor by diverting funds due to be paid jointly to the subcontractor and suppliers of materials, and applying them to pay other creditors of the subcontractor.

3. It should be decided if the equitable liens doctrine in Henningsen v. United States Fidelity & Guaranty Company, 208 U. S. 404, 28 S. Ct. 389, 52 L. Ed. 547, is limited to funds in which the United States has an interest or over which it can exercise control, rather than applying to all payments flowing from the construction, as an equitable principle of general application.

The reasons are interrelated, so they will be considered together:

The Government is under no legal obligation to pay laborers and materialmen, but it is under an equitable obligation to do so. U. S. v. Munsey Trust Company

(1947), 332 U. S. 234, 67 S. Ct. 1599, 91 L. Ed. 2022; National Surety Corporation v. U. S. (1955), 132 Ct. Clms. 724, 133 F. Supp. 381. To meet this moral obligation, and as a substitute for a mechanics lien statute, Congress passed the Act of 1894, 28 Stat. 228, known as the Heard Act, which was amended from time to time, and finally on August 24, 1935, 40 U. S. C. A., Secs. 270 a, b and c became the present Miller Act. Section 270a(a)(2) of the Act says that the payment bond shall provide for the protection of "all persons supplying labor and material in the prosecution of the work provided for" in the primary contract. This Court decided that Congress meant by this statement first and second tier subcontractors, that is, subcontractors in immediate contractual relationship with the prime contractor, and labor or materialmen supplying such subcontractors. MacEvoy v. United States for the use and benefit of Calvin Tomkins Co. (1944), 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163. Petitioners are materialmen supplying such a subcontractor. Brogan v. National Surety Company (1918), 246 U. S. 257, 38 S. Ct. [illegible], 62 L. Ed. 703; U. S. v. S. Birch & Sons Construction Company (1941), 43 F. Supp. 726; U. S. v. Castro (1947), 71 F. Supp. 36; Indemnity Insurance Company of North America v. Browning-Ferris Machinery Company (1955), 227 Fed. 2d 804; Continental Casualty Company v. Clarence L. Boyd Company (1944), 140 Fed. 2d 115, 116; U. S. v. Chester Construction Company (1939), 104 Fed. 2d 648, 649.

Under the Miller Act (U. S. C. A. 270b(a)) this latter class of second tier subcontractors, namely, materialmen and laborers, must give notice of their claim to the prime contractor within 90 days from the date on which they furnish their last material or do their last work, where there is no contractual relationship express or implied. The petitioners had a contractual relationship as third party beneficiaries. The purpose of the notice provision is to enable the prime contractor to use funds he has not paid the subcontractor in order to secure himself against the claims of unpaid laborers and materialmen.[1]

This 90 day notice requirement is sufficient if there is a writing from which it plainly appears, in connection with oral testimony, that the nature and amount of the indebtedness was brought home to the general contractor.[2] The prime contractor had such notice in the instant case, as the subcontract (Appendix 7, page 38a) provided that by the fifth of the month, the subcontractor will present an itemization of all actual costs for the preceding month (*see also,* Appendix 4, page 21a).

---

[1]In this respect it has the same purpose as the notice provision in mechanics lien laws. United States for the use of J. H. Welch Co. v. Fleisher Engineering and Construction Co., 30 F. Supp. 961 (D. C. N. Y., 1939); United States for the use of Bruce Co. v. Fraser Construction Co., 87 F. Supp. 1 (W. D. Ark., 1949); United States for use of John A. Denie's Sons Co. v. Bass, 111 Fed. 2d 965 (6th Cir., 1940); United States for the use of Hargis v. Maryland Casualty Co., 64 F. Supp. 522 (Cal., 1946).

[2]Houston Fire and Casualty Insurance Co. v. United States for the use of Trane Co., 217 Fed. 2d 727 (5th Cir., 1954); Coffee v. United States for the use of Gordon, 157 Fed. 2d 96[8] (5th Cir., 1946).

But the Miller Act is not an exclusive remedy. Belknap Hardware and Manufacturing Company v. Ohio River Contract Company (1921), 271 Fed. 144, 146; Socony-Vacuum Oil Company v. Continental Casualty Company (1955), 219 Fed. 2d 645, 650. Thus, petitioners had an election of remedies, as follows:

1. To proceed under the Miller Act against Bateson's surety.
2. To proceed against Bateson for their share of funds due to be paid jointly to petitioners and Davis.
3. To proceed against Davis as trustee of funds due petitioners from Bateson, and as general creditors of Davis.
4. A combination of 2 and 3.

Now, suppose they had chosen course numbered 1? The result would have been that Bateson's surety would have paid the Petitioners, and would have been subrogated to petitioners to collect from Bateson out of funds due Davis. Henningsen v. U. S., *ubi supra;* Belknap Hardware and Manufacturing Company v. Ohio River Contract Company, *supra;* In re P. McGarry & Son (1917), 240 Fed. 400; Greenville Savings Bank v. Lawrence (1896), 76 Fed. 545; Cox v. New England Equitable Insurance Company (1917), 247 Fed. 955; Philadelphia National Bank v. McKinley (1934), 72 Fed. 2d 89, cert. denied, 293 U. S. 583, 55 S. Ct. 96; American Surety Company of New York v. Westinghouse Electric Manufacturing Company, 296 U. S. 133, 56 S. Ct. 9, 80 L. Ed. 105. The resulting

reduction of retained funds due Davis in Bateson's hands would have diminished the recovery of respondents. Should a different result attend the pursuit of course numbered 3, above, the election actually made after Bateson had made joint payment by way of interpleader?

As a general proposition, an election of remedies does not alter the substantive rights of the parties, and the holdings of the Courts below err in this respect. The remedy actually pursued by petitioners should have directly diminished the fund available for payment of respondents' claims to exactly the same extent as a proceeding under the Miller Act would have indirectly done, for the following reasons:

a. Petitioners were third-party beneficiaries or "creditor beneficiaries" under the contract between Bateson and Davis. Restatement of the Law of Contracts, Sec. 133; Socony-Vacuum Oil Co. v. Continental Casualty Co., 219 Fed. 2d 645; *see also,* Jackson Lumber Co. v. Union Transfer and Storage Co. (1932), 246 Ky. 653, 55 S. W. 2d 670; Wilmington Housing Authority v. Fidelity and Deposit Co. (Del. 1946), 47 A. 2d 524, 170 A. L. R. 1288.

b. Those responsible for the physical completion of building contracts have an equitable claim to be paid from available moneys ahead of others whose claims come from the advance of money. U. S. v. Munsey Trust Co., 332 U. S. 234, 240, 67 S. Ct. 1599, 1602, 91 L. Ed. 2022., 2028; *see also,* Henningsen v. U. S.; Belknap Hardware and Manufacturing Co. v. Ohio River Contract

Co., and other cases hereinabove cited; to the same effect, *see*, Seaboard Surety Co. v. Spear (1941), 119 Fed. 2d 849.

Under either view of petitioners' claims, Bateson was bound to pay them in preference to paying Davis; Davis could not have assigned to the Respondent bank any greater right than he held, nor could the Government's tax liens have reached any funds not unconditionally due him. To hold otherwise, as the District Court and Court of Appeals have done, disregards both settled law and the announced policy of Congress, as well as impairing the obligation and abrogating the term of a written contract.

## CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARDY & LOGAN,
RALPH H. LOGAN,
MARSHALL B. HARDY, JR.,
506 W. Jefferson Street,
Louisville, Kentucky,
*Attorneys for Petitioner, Embry Brothers, Inc.*

WILLIAM B. COHEN,
1516 Ky. Home Life Bldg.,
Louisville, Kentucky,
*Attorney for Petitioner, James Drury.*